Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	

COMMENTS OF NEW AMERICA FOUNDATION, CONSUMERS UNION, AND MEDIA ACCESS PROJECT

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I. INTRODUCTION

In order to effectively deploy "robust, affordable broadband to all Americans,"[1] the Commission must move beyond the traditional commercial model of service and develop policies that encourage efficient use of existing infrastructure. So doing requires a close examination of and attention to the legal framework currently in place, and the adoption of rules that confirm Community Networks' eligibility for support from the Universal Service Fund ("USF").

In addition, the Commission should adopt public interest obligations that adequately protect consumer interests, particularly where the there is a chance that the Commission may fund a single provider in a geographic area.

II. THE COMMISSION SHOULD EXPAND PROVIDER AND SUPPORTED SERVICE ELIGIBILITY FOR HIGH-COST AND CONNECT AMERICA FUND SUPPORT.

As Public Interest Commenters have shown, Community Networks have tremendous ability and potential to provide service to high-cost areas, particularly in those areas where the potential return on investment is so low as to preclude even subsidized buildout by commercial carriers.[2] It is critical for the Commission to affirm that these networks may be eligible for support from the Fund. In order to provide connectivity to the largest number of recipients, the Commission should focus on supporting a broad range of network providers including those deploying comprehensive, scalable community infrastructure that leverages community anchor institutions. The Commission should not perpetuate policies that tend to rely exclusively on an incumbent and commercial model of service. Therefore, the Commission should broaden explicitly its eligibility criteria, either by classifying interconnected VoIP as a telecommunications service or by adopting explicit rules that permit facilities-based providers of any voice service, including VoIP, to be eligible for support. In addition, the Commission must be

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[1] NPRM ¶ 1.

[2] *See* Comments of New America Foundation, Consumers Union, and Media Access Project at 9; *see also* NATOA Comments at 5. Unless otherwise designated, all references are to comments filed in WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, and GN Docket

forward-thinking as it transitions the Universal Service Fund to support broadband service, and it could find that Community Networks providing broadband service are eligible on other bases as well.

A. The Commission should confirm that any facilities-based provider of a voice service may be deemed eligible for high-cost and Connect America support.

The Commission's ability to expand provider eligibility for USF depends on the language of Section 214, which allows "[a] common carrier designated as an eligible telecommunications carrier" by the Commission or by a state "to receive universal service support in accordance with section 254" of the Act if that provider offers the supported services established by the Commission.[3] Thus, eligibility traditionally depends upon a provider's status as a "Title II" carrier.

Classification of interconnected VoIP has remained in limbo for years.[4] By classifying the service as a telecommunications service, the Commission could provide the clarity needed to expand USF eligibility to encompass providers who currently provide interconnected VoIP voice service, and also would create a path by which broadband-only providers could gain eligibility if they begin offering an interconnected VoIP service. At the very least, the Commission should consider explicitly expanding and endorsing eligibility for any facilities-based broadband provider of voice service using any technology (including VoIP).

The Commission asks whether it "should consider classifying interconnected voice over Internet protocol as a telecommunications service or an information service."[5] Classification of interconnected VoIP as a telecommunications service would reconcile the existing piecemeal obligations currently required of interconnected VoIP providers and clarify such providers' ability to receive USF support. Since 2006, interconnected VoIP providers have been required to comply with

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No. 09-51, on April 18, 2011.

3 47 U.S.C. 214 (e)(1).

4 *See, e.g.*, In the Matter of IP-Enabled Services, WC Docket No. 04-36, *Report and Order*, 24 FCC Rcd 6039, ¶ 8 n.21 (2009).

5 NPRM ¶ 73.

reporting and contribution requirements under the Universal Service Fund.[6] In addition, they are required to comply with E911 and Communications Assistance for Law Enforcement Act ("CALEA") obligations.[7] While gradually increasing the telecommunications-oriented requirements imposed on these providers, the Commission has refused to classify VoIP as a telecommunications service, leaving VoIP providers with limited and inconsistent opportunities to receive USF support.[8] Classification of interconnected VoIP as a telecommunications service would not only allow providers thereof to receive support under the high-cost (and, ultimately, Connect America) portion of the fund, but would allow them to be eligible providers for other portions of the fund as well, such as the Lifeline and Link Up mechanisms or any Low-Income program successor funds. Thus, while some commenters have attempted to dissuade the Commission from Title II classification by noting that interconnected VoIP providers already pay into the fund,[9] their arguments ignore the fact that these providers' eligibility to *receive* support remains in doubt.

The still uncertain regulatory classification of interconnected VoIP acts as a potential obstacle

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6 *See, e.g.*, In the Matter of Universal Service Contribution Methodology, WC Docket No. 06-122, *Declaratory Ruling*, 25 FCC Rcd 15651, ¶ 6 (2010) ("*Contribution Ruling*").

7 *See id.* ¶ 6 n.15. Public Interest Commenters recognize that the Commission has used the different statutory language of CALEA, for example, to explain its interpretation of CALEA's requirements. *See* American Council on Educ. v. FCC, 451 F.3d 226, 228 (D.C. Cir. 2006). Despite the different statutory basis for its authority there, the Commission's interpretation of that authority to extend CALEA to broadband networks and interconnected VoIP services reinforces the understanding of such networks and services as "transmission" infrastructure properly subject to Title II. *See id.* (quoting 47 U.S.C. § 1001(8)(B)(ii)).

8 For example, the Commission has allowed interconnected VoIP providers to receive support under the E-Rate portion of the fund specifically. *See, e.g.*, In the Matter of Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Report and Order and Further Notice of Proposed Rulemaking*, 25 FCC Rcd 6562, ¶ 12 (2009).

9 *See, e.g.*, Time Warner Cable Comments at 23-24. For instance, Time Warner Cable does not mention the fact that the contribution and eligibility provisions in Section 254 are in two separate subsections of the statute. The Commission's interpretation of its ability to require contributions under Section 254(d) from not only telecommunications carriers but also "[a]ny other provider of interstate telecommunications" undergirds its decisions to assess interconnected VoIP for contributions. *See Contribution Ruling* ¶¶ 2-4. Sections 214(e) and 254(e) contain no such reference to "other provider[s]" in addition to telecommunications carriers.

to Community Networks' receipt of support, even when they are positioned to serve communities that may otherwise go unserved. Classification of interconnected VoIP as a telecommunications service, or at the very least, a definition of eligibility that includes facilities-based providers of a functional voice service equivalent, is imperative to achieving the Commission's statutorily mandated universal service goals as well as the Administration's goal of ensuring ubiquitous broadband access for all Americans.

B. The Commission has both the statutory authority and responsibility to treat broadband as a supported service, and it should confirm that Community Networks are eligible recipients as the high-cost fund transitions to the Connect America Fund.

The proper classification of interconnected VoIP or broadband Internet access as telecommunications services would provide the best mechanism for broadband providers without a legacy phone service offering to be eligible for support.[10] Yet, there are other options as well. The Commission also could locate authority for the transition to broadband, and broader eligibility for Community Networks that provide broadband service, within its existing legal framework for broadband.

Reliance on existing jurisdictional interpretations also might prevent hardships that could result from some of the voice service-based proposals set forth in the NPRM. For example, the NPRM proposes "that recipients be required to offer voice telephony service as a standalone service."[11] While it further asks if it may be "sufficient that a customer could subscribe to an over-the-top VoIP service for voice service," adoption of the standalone voice service requirement could prevent a broadband-only provider from receiving support as the Commission transitions to the Connect America Fund – even with the classification of interconnected VoIP (but not broadband Internet access) as a telecommunications service.

However, as other commenters have suggested, the Commission has various sources of

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[10] *See, e.g.*, Comments of the National Association of State Utility Consumer Advocates at 34.

[11] NPRM ¶ 99.

authority to support broadband services through the Universal Service Fund.[12] This authority could derive from a number of sections within the Communications Act, or potentially from forbearance from certain provisions of that Act.

The language of Section 254 includes multiple (and somewhat inconsistent) references to "information services," "advanced services," and "telecommunications services," and the best reading of the section in its totality is one that would permit the Commission to direct funding from the Universal Service Fund to broadband deployment in support of "advanced telecommunications" deployment. Indeed, a reading of Section 254 in its entirety at the very least creates a level of ambiguity sufficient to trigger *Chevron* deference, giving the Commission the ability to adopt a reasonable interpretation of the statute's meaning.[13] Section 254(c)(1) notes that "[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services."[14] Even within this subsection, the tensions between the two terms are obvious and illustrate the potential ambiguity in interpretation. Public Interest Commenters therefore agree with the suggestion reported in the NPRM "that section 254 is ambiguous regarding the Commission's authority to support broadband service, but that read as a whole, it may reasonably be interpreted to authorize such support."[15] As the NPRM itself suggests, Section 254(b)'s requirement that the Commission

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[12] AT&T Comments at 111. The Public Interest Commenters in this submission support AT&T's comments only insofar as those comments relate to the legitimacy of the Commission's authority to direct funds to support broadband deployment in high cost areas. As noted below, the Public Interest Commenters disagree with AT&T's proposed rejection of public interest obligations.

[13] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (noting that "if the statute is silent or ambiguous with respect to the specific question, the issue for the court is whether the agency's answer is based on a permissible construction of the statute.").

[14] 47 U.S.C. § 254(c)(1); *see also* AT&T Comments at 115 ("A cramped reading of section 254 that fixates on the 'telecommunications' language and ignores the 'information services' language would also contradict provisions elsewhere in the Act that elucidate Congress's intent for the Commission to promote broadband and other advanced services.").

[15] NPRM ¶ 61 (citing assorted AT&T comments and presentations).

"promote access to 'advanced telecommunications and information services'" essentially "requires supporting broadband networks."[16]

Moreover, Section 706, read either in conjunction with Section 254 or on its own, provides additional bases for Commission authority to support broadband. On one hand, Section 706(a) buttresses the more expansive reading of Section 254 by reinforcing the Commission's directive to encourage deployment of "advanced telecommunications capability to all Americans."[17] Similarly, Sections 706(b) and (d) may be read as a directive in their own right, by defining advanced telecommunications capability as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology,"[18] and directing the Commission to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment."[19] The Commission has already found that areas of the country are presently underserved or unserved,[20] thus barriers do exist for infrastructure investment. Section 706 therefore not only permits, but *directs*, the Commission to expand deployment of broadband services, and the Universal Service Fund is one primary method for doing so.

Alternatively, some commenters suggest that the "Commission could forbear from sections 254(c)(1) and 254(e), or from any other statutory provision that could conceivably limit universal service to 'telecommunications' carriers or services."[21] The NPRM sought comment on this option as an alternative approach to broadband authority, asking whether it "[c]ould [ ] likewise forbear from

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16 *Id.* (quoting 47 U.S.C. § 254(b)).

17 47 USC § 1302(a); *see also* AT&T Comments at 116.

18 47 U.S.C. § 1302(d).

19 *Id.* § 1302(b).

20 *See generally* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket 10-159, *Seventh Broadband Progress Report and Order on Reconsideration*, FCC 11-78, ¶¶ 50-52 (rel. May 20, 2011).

applying sections 254(e) and 214(e), which restrict universal service support to ETCs."[22] Public Interest Commenters maintain that classification of interconnected VoIP and broadband Internet access services as telecommunication services provides a better route to supporting broadband with USF, yet note that the Commission does have other options before it.

III. THE COMMISSION ALSO MUST ADOPT ADEQUATE PUBLIC INTEREST REQUIREMENTS FOR RECIPIENTS OF SUPPORT.

The NPRM sought "comment on what public interest obligations should apply to ETCs going forward as we reform and modernize the existing high-cost program to advance broadband."[23] Adoption of proper obligations would give the Commission an important opportunity to ensure that federally funded broadband buildout meets its policy objectives. In Public Interest Commenters' initial filing, we urged the Commission, at minimum, to adopt the same non-discrimination and network interconnection obligations applicable to recipients of Broadband Technology Opportunities Program ("BTOP") funds. We reiterate those suggestions here, responding to unfounded arguments of other commenters opposed to such obligations. In addition, Public Interest Commenters urge the Commission to avoid adopting baseline requirements with respect to speed and capacity that may already be outdated. Instead, the Commission should be as forward-looking as possible with any speed requirements, and should think broadly and prospectively about remaining competitive with international counterparts.

Some commenters suggested generally, while not opposing all such requirements, that public interest obligations "should avoid placing unwarranted burdens on funding recipients."[24] At the outset, it should be noted that applicants are not required to apply for funding to support broadband.

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21 AT&T Comments at 116.

22 NPRM ¶ 72.

23 *Id.* ¶ 92.

24 U.S. Cellular Comments at 41.

Furthermore, to gauge the "burdens" imposed by certain requirements, the Commission can look to the great success of the National Telecommunications and Information Administration's BTOP program that proved a significant number of commercial entities are willing to accept non-discrimination obligations. Indeed, far from being viewed as too burdensome, the BTOP funding opportunity saw 1,582 applicants apply for a total of $29.6 billion, far exceeding available funds.[25] The Commission should draw on the lessons learned from the successful components of the BTOP process, and incorporate them into its rules to modernize the existing high-cost program.

Moreover, some commenters echoed Public Interest Commenters' competition concerns with respect to the proposal to fund a single network in a high-cost area. Public Knowledge and the Benton Foundation noted that "awarding CAF subsidies to a single bidder...has the advantage of preventing duplicative awards in each geographic area. However...this reduction in the subsidy amount comes at a price of suppressing potential competition once a market is established."[26] U.S. Cellular warned that "the proposed auction mechanism would install a government-selected monopoly service provider in each geographic service,"[27] and a "single-winner auction will hand over dominant market power to auction winners, skewing competitive markets."[28]

The Commission must determine how to support competitive broadband with limited funds, and requiring open access is a solution. As Public Interest Commenters discussed in their initial comments and elsewhere, infrastructure projects funded by BTOP were required to offer interconnection at reasonable rates. As New America, Media Access Project, and dozens of joint commenters explained in comments filed with NTIA to support such requirements for BTOP, "[i]nterconnection

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[25] The Broadband Technology Opportunities Program, "Expanding Broadband Access and Adoption in Communities Across America: Overview of Grant Awards," (Dec. 14, 2010), *available at* http://www.ntia.doc.gov/reports/2010/NTIA_Report_on_BTOP_12142010.pdf.

[26] Comments of Public Knowledge and Benton Foundation at 11-12.

[27] U.S. Cellular Comments at 16.

[28] *Id.* at 8.

requirement[s] are essential to spurring multi-use, multisectoral network[s] rather than single purpose networks."[29] Requiring open access creates opportunities for network operators, concerned about being shut out of markets, to have access to infrastructure, and limits the potential harms of a de-facto monopoly in areas where only a single network is supported by USF.

With limited resources, there is little opportunity for the Commission to do more than fund only one network in most, if not all, high-cost communities. However, by requiring interconnection and imposing open access obligations, the Commission can still create opportunities for competitive services.

The National Broadband Plan suggested a "universalization target of 4 Mbps [megabits per second] download and 1 Mbps upload," as well as a goal that "100 million U.S. homes should have affordable access to actual download speeds of at least 100 Mbps and actual upload speeds of at least 50 Mbps by 2020."[30] Some network operators commented in support of that target in this proceeding, with others concerned about the distinction between mobile and fixed line services. For example, "U.S. Cellular favors using a speed threshold of 4 Mbps (download) and 1 Mbps (upload) as a proxy for defining the capabilities of broadband, although U.S. Cellular also suggests that mobility should be defined as a separate broadband metric, and that the Commission should develop speed measurement criteria that reflect the unique nature of mobile broadband infrastructure and networks."[31] T-Mobile suggested an even lower threshold, asserting "that 768 kbps is an acceptable minimum download speed for the first phase of CAF."[32]

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[29] Comments of New America Foundation *et al.*, Department of Commerce and Department of Agriculture Joint Request for Information, at 24 (filed Nov. 30, 2009), *available at* http://newamerica.net/sites/newamerica.net/files/profiles/attachments/NAF_NTIARUS_RFI_113009.pdf

[30] See *Connecting America: The National Broadband Plan*, at 9, 135 (March 2010).

[31] U.S. Cellular Comments at 43.

[32] T-Mobile Comments at 14.

The Commission must ensure that funded projects support "robust, affordable broadband."[33] In the past, the Commission generally has pursued policies that were technology neutral. However, technology neutral does not mean depressing critical requirements such as speed simply to maximize the number of eligible entrants. In many respects, the modest 4 Mbps universalization target is already an insufficient goal for 2020.[34]

In a recent report, the International Telecommunications Union ("ITU") described theoretical download times at different rates. As web pages become more complex and media intensive, the threshold for "adequate" speeds will continue to rise.

Download	**Size**	**256 Kbps**	**2 Mbps**	**40 Mbps**	**100 Mbps**
Simple web page	*160 KB*	5 seconds	.64 seconds	.03 seconds	.01 seconds
ITU Home Page	*750 KB*	23 seconds	3 seconds	.15 seconds	.06 seconds
Music Track	*5 MB*	3 minutes	20 seconds	1 second	.4 seconds
Video Clip	*20 MB*	10 minutes	1 minute	4 seconds	1.6 seconds
CD / Low quality movie	*700 MB*	6 hours	47 minutes	2 minutes	56 seconds
DVD / High quality movie	*4 GB*	1.5 days	4.5 hours	13 minutes	5 minutes

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While setting a reasonable metric for end-user speed can serve as an important baseline for initial buildout, these numbers should encourage the Commission to adopt a forward-thinking policy that anticipates the need for scalable and ever-increasing speeds and capacity. Measured but more

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[33] NPRM ¶ 1.

[34] James Losey, Chiehyu Li, Sascha Meinrath, "Broadband Speeds in Perspective," New America Foundation (Mar. 2010) *available at* http://newamerica.net/publications/policy/broadband_speeds_in_perspective#_ftn1.

[35] ITU Broadband Commission, "The Future Built On Broadband," at 21 Table 1: Theoretical Time To Download Data Online at Different Connection Speeds., http://www.broadbandcommission.org/report1/report1.pdf.

ambitious goals are necessary not just to ensure that users in high-cost areas have access to broadband service comparable to their urban counterparts in compliance with Section 254 of the Act, but also to keep the U.S. competitive with other nations in the 21st Century.

VI. CONCLUSION

In facilitating the transition of the High-Cost Fund to the broadband-inclusive Connect America Fund, the Commission should adopt more permissive eligibility requirements and, in so doing, should consider classifying interconnected VoIP as a telecommunications service. In addition, the Commission must consider broadly the paths by which it can expand its support broadband service and community-based providers thereof. Finally, the Commission must adopt specific public interest obligations including network neutrality, open access, and speed requirements to ensure that all Americans can access broadband service of comparable quality at affordable rates.

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